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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 89

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

vs.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchison, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE J. ENGELMAN,
Counsel for Respondent.

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Supreme Court of the United States

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

against

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchison, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Respondent brought this action under the Jones Act for the wrongful death of his intestate, arising out of injuries sustained on February 1st, 1945, while serving as a member of the crew of the *S.S. Francis Amasa Walker;* petitioner was charged with negligence (Record, pp. 3-5). Respondent's intestate was tightening a turnbuckle when one of the screws parted from the barrel of the turnbuckle and he was thereby precipitated to the deck, sustaining injuries causing his death (Record, pp. 200-205). Respondent obtained a jury verdict in the amount of $23,000.00 (Record, p. 155). Petitioner appealed to the United States Court of Appeals, Second Circuit, which affirmed the judgment below, 170 F. 2d 882 (Record, p. 341).

The Court of Appeals found that the case was submitted to the jury on "the condition and installation of the turn-

buckle" (Record, p. 344). There was evidence that the turnbuckle which was always disconnected in port, when cargo was worked, had not been connected and set up in a safe, proper and customary manner by the crew; there was evidence that the worn condition of one of the eyebolts of the turnbuckle was due to careless handling by the crew (Record, pp. 97, 129 to 134, 165, 184). Thus, the verdict was a finding that respondent's intestate lost his life through the negligence of fellow servants. Petitioner, in item 2 of its "Specification of Errors to be Urged" on page 4 of its petition, concedes that the Court of Appeals held that petitioner was liable for the negligence of "a member of the crew of the *S.S. Francis Amasa Walker*".

Counsel for the parties stipulated that the petitioner operated the *S.S. Francis Amasa Walker* under the "wartime standard form of agency agreement G.A.A. 4-4-42" (Record, p. 211), considered by this Court in *Cosmopolitan Shipping Company* v. *McAllister*, decided by this Court June 27th, 1949. Although respondent's intestate was employed on a foreign voyage and signed Shipping Articles, petitioner did not introduce the Shipping Articles in evidence; it offered no proof that it disclosed to respondent's intestate or other members of the crew that it was acting as an agent, that its principal was the United States and that the crew were employees of the United States.

The Court of Appeals held the petitioner liable for the negligence found, for the reasons it had given in *McAllister* v. *Cosmopolitan Shipping Company, Inc.*, 2 Cir. 169 F. 2nd 4 (Record, p. 346). Believing that *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, was controlling, neither in its brief nor in its argument before the Court of Appeals did respondent attempt to fasten liability on the petitioner for its failure to prove that it made disclosure of its principal and that matter was not considered by that Court.

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Question Presented.

Is the petitioner, a general agent of the United States under the wartime standard form of agency agreement, "G.A.A. 4-4-42" liable as an employer under the Jones Act, for the wrongful death of respondent's intestate, brought about by the negligence of fellow servants, when it offered no proof that it disclosed to respondent's intestate and to the crew, that it was an agent, that the United States was its principal and that the crew were employees of the United States.

POINT I.

A general agent must prove that there was disclosure to the officers and crew that it was an agent, that the United States was its principal and that the officers and crew were employees of the United States, or it is estopped to deny liability as an employer in a lawsuit against it under the Jones Act, based on the negligence of fellow servants.

Because the general agent procures the officers and crew through the "usual channels" and "in accordance with the customary practice of commercial operators", under Art. 3 A (d) of the General Agency Agreement, set forth in the opinion of this Court in the *McAllister* case, the performance of the agreement by the general agent will cause the officers and crew to believe that they are employees of the general agent unless disclosure is made to them. In the *McAllister* case this Court recognized the importance of such disclosure and in fact the holding of that case is based upon it. There, the Shipping Articles under which McAllis-

ter was employed, were offered in evidence and not only recited that the steamship company was "general agent for the United States" but further gave notice to the officers and crew that they were "employed by the United States", and this Court, at the conclusion of its opinion said:

> "The Shipping Articles summarized above, p. 2., complied with the tenor of the General Agency Agreement by making it clear that respondent was an employee of the United States."

Where there is no disclosure, the General Agent is estopped to deny liability as an employer, for the complement of the vessel have been led to believe that they are employees of the General Agent and that they have the usual rights, including the right of jury trial, in a personal injury action under the Jones Act against the General Agent; further, they have been deprived of the right to refuse employment by the United States and to insist upon the more liberal remedies against a private operator. And the burden is on the General Agent to prove as a defense that it disclosed to members of the crew the name of its principal, *Lewis* v. *U. S. Navigation Company*, 1944 A. M. C. 1241. There Judge Knox held a General Agent liable for damages in an action brought against it under the Jones Act, by a member of the crew, because of the negligence of a fellow servant, where the General Agent failed to prove that it disclosed to the plaintiff, the name of its principal, Judge Knox said:

> "Nevertheless, it was held in Horan *v.* Hughes, 129 Fed. 248, aff'd 129 Fed. 1055, that an agent who enters into a contract with another, and in his own name, without making disclosure of the name of his principal, may be held to liability thereon. In order to create a valid defense, he must prove that such disclosure was made. No such proof is now before the

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court. If any exists, it should have been made to appear. Plaintiff, apparently, was without knowledge of the agency agreement between defendant and the United States, and such agreement cannot deprive plaintiff of his rights under his contract of employment. Brady *v.* Roosevelt S. S. Co., *supra.* When plaintiff responded to (defendant's) call for men to man the ship, he was not told of the existing agency, and he had a right to assume, under practices long familiar to seamen, that he was being employed by defendant."

Koistinen v. *American Export Lines, Inc.*, 1948 A. M. C. 1464, and *Yancey* v. *North Atlantic and Gulf Steamship Co.*, 1948 A. M. C. 317, are to the same effect.

It is well settled in law that an agent is personally liable unless it makes disclosure of the identity of its principal. *Holt* v. *Ross*, 54 N. Y. 472; *Cobb* v. *Knapp*, 71 N. Y. 438; *DeRemmer* v. *Brown*, 165 N. Y. 410; *Horan* v. *Hughes*, 129 Fed. 248, aff'd 2 Cir., 129 Fed. 1005. The latter case applied the principle in Admiralty. In placing the burden on the agent to make disclosure of the identity of its principal, the Court of Appeals said:

> "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."

In the *McAllister* case, this Court said:

> "We assume without deciding that the rule of the Hearst case applies, that is, the word 'employment' should be construed so as to give protection to sea-

> men for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied."

Certainly petitioner stands in more than the "proximate relation of employer", for failure to disclose its principal. And, authorities already cited, hold that the "rules of private agency" *can* be rigorously applied and yet petitioner can not escape liability as an employer.

The verdict was a finding that wrongful death was occasioned by the negligence of fellow servants of respondent's intestate; because of petitioner's non-disclosure of its principal, those fellow servants, as well as respondent's intestate, had an employee relationship to petitioner; therefore, petitioner is liable for their negligence.

POINT II.

The petition should be dismissed.

Respectfully submitted,

GEORGE J. ENGELMAN,
Attorney for Respondent.

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